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AWANG AHMAD FAISAL AWANG SOHOR v. PP

HIGH COURT SABAH & SARAWAK, SRI AMAN
ALWI ABDUL WAHAB JC
[CRIMINAL APPEAL NO: SRA-41H-2-3-2015]
27 JULY 2015

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CRIMINAL PROCEDURE: *Sentencing – Procedure – Previous conviction – Taking into account accused's previous convictions in passing sentence – Duty of court – Whether must inform and explain previous convictions to accused – Whether must obtain accused's confirmation on convictions – Failure to abide by procedure – Whether improper – Whether sentence liable to be disturbed*

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The learned Magistrate in this case, in passing sentence against the appellant for an offence under the Dangerous Drugs Act 1952 ('Act'), had taken into account the accused's two previous convictions for the same offence. In doing so, however, the learned Magistrate had not deemed it necessary to alert the appellant to his said previous convictions, or explain to him as to the import or purport of such convictions *vis-à-vis* the sentence to be meted out against him. The appellant argued that such lapses by the court was prejudicial to him, and was tantamount to the court not informing him of the consequences of his guilty plea to the present charge against him (under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('Act')), for which he was sentenced to six months' jail and ordered to undergo police supervision for a period of three years. This was the appellant's appeal against the sentence thus passed against him.

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Held (allowing appeal; substituting jail term with fine sentence but affirming supervision order):

(1) There is nothing wrong for the learned Magistrate to take into consideration the appellant's previous convictions before passing sentence. This notwithstanding, proper procedures need to be followed to ensure that there is no miscarriage of justice. Firstly, the appellant's record of previous convictions must be furnished to court, or at least presented orally by the prosecution in the hearing of the accused. Secondly, the appellant must be asked whether the list of previous convictions were admitted to be correct. The learned Magistrate could not proceed to consider the appellant's previous convictions (in passing sentence) unless this procedure is followed. (paras 6 - 9 & 11)

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(2) The Appeal Record did not show that the appellant was being informed, explained or refreshed of his previous convictions. There was hence clear procedural impropriety in this case where justice did not seem to have been done. Consequently, the appeal is allowed and the jail sentence is substituted with a fine of RM5,000 in default three months' imprisonment. The supervision order is however maintained. (paras 11 & 12)

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Case(s) referred to:
PP v. Jafa Daud [1981] 1 LNS 28 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 15(1)(a), 38B

For the appellant - Abdul Rahman Mohamad Hazmi; M/s Ziyyad Mohammad & Co Advocs
For the respondent - Noor Fadzila Ishak; DPP

Reported by Wan Sharif Ahmad

JUDGMENT

Alwi Abdul Wahab JC:

Introduction

[1] The accused ("the appellant") was charged under s. 15(1)(a) Dangerous Drugs Act 1952. He was convicted on his own plea of guilty and was then sentenced to six months imprisonment and supervision for three years under s. 38B Dangerous Drugs Act 1952. The sentence took effect from the date of sentencing ie, 6 March 2015. The sentence was passed by the learned Sessions Court Judge who sits as the Magistrate ("the learned Magistrate").

The Appellant's Complaint

[2] The appellant's complaint against the learned Magistrate's sentence centred around where the learned Magistrate said:

> From this Court record, the accused had ever been charged (Case No. SRA-83D-45/10-2014) whereby last year, he was fined of RM1,000.00 in default of 2 months jail and he was put under supervision for the period of 2 years. However, on 6.3.2015 (today), again the accused was charged under the same offence whereby in case No. SRA-83D-23/1-2015, the accused was fined of RM3,500.00 in default of 3 months imprisonment and he was ordered to undergo a 2 years supervision. And now, the accused is facing another one charge of the same nature of which the accused is appealing now. Looking at strings of the same nature of the offence that the accused has committed, I am of the view, the imposition of fined has carried less deterrent to him and he has not learnt and regretted from what he has done. (pp 15 and 16 of the Record of Appeal)

The learned Magistrate then said:

> I am of the view, the maximum fined of RM5,000.00 as provided under s. 15(1) DDA 1952 has no deterrent effect to the drug abusers. (p. 17 of the Record of Appeal).

The learned Magistrate further said:

> Therefore the best measure to curb and to deter the abusers is by imposing an appropriate sentence. It is because this Court has imposed an immediate imprisonment sentence of 6 months upon the accused. The

> accused immediately appealed against my sentence for sending him to jail. I do not think that the accused would appeal against my sentence if I were to pass a sentence of fined and that does not serve any deterrent to him. This is shown and proven when the accused did not appeal on another case of the same nature of which I have convicted him on the same day with this case under case No. SRA-83D-23/1-2015 whereby I had imposed a fined of RM3,500.00 in default of 3 months imprisonment. (pp 18-19 of the Record of Appeal)

[3] From the above judgment, the learned Magistrate took the view that the imposition of fine on the accused in the instant case was not effective to deter the accused from committing the same offence. The sentence of fine was also not suitable for reason that the accused could settle the fine if imposed by the court as what had happened in both previous cases (Case No. SRA-83D-45-10-2014 and Case No. SRA-83D-23-1-2015]. Hence, the appropriate sentence to be meted out was an imprisonment.

[4] For Case No. SRA-83D-45-10-2014, the accused was charged and convicted under s. 15(1)(a) of DDA in 2014 and for Case No. SRA-83D-23-1-2015, the accused was charged and convicted for the same offence on 6 March 2015 together with the conviction in the instant case which also involved similar offence (Case No. SRA-83D-47-3-2015).

[5] The crucial part of the complaint was this. The appellant was never told of the consequence of his guilty plea that in passing sentence in the instant case, the learned Magistrate will take into account his previous convictions in Case No. SRA-83D-23-1-2015. As appeared in the notes of proceedings, the appellant was only told of the nature and consequences under ss. 15(1) and 38B DDA 1952 but nowhere was he ever been told by the learned Magistrate of the effect of his earlier plea of guilty to Case No. SRA-83D-23-1-2015 (p. 10 of the Appeal Record). Hence this appeal.

[6] In my opinion, there is nothing wrong for the learned Magistrate to take into consideration the accused's previous convictions before passing the sentence. This has been the practice by the court for the past years until now. It would only be reasonable for the court to consider the accused's past record of previous convictions in order to determine the appropriate sentence to be meted out. The sentence given to the accused with previous record of past convictions would certainly be different from the sentence given to the first offender committing similar offence. Support can be found in the decision given by Mohamed Azmi J in *Public Prosecutor v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315, where he said at p. 316:

> In assessing sentences, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused. Where the convicted person has previous records and admits them as correct, the Court must consider whether the offence or offences

> committed previously were of similar nature as the one with which he is presently charged. The court must then consider the sentence imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then it is in the interest of justice that a deterrent sentence would be passed and, in such a case, unless there are exceptional circumstances, the quantity, nature or value of the subject-matter of the offences with which he is currently charged can very rarely constitute a mitigating factor.

The judge further held:

> One final point regarding the previous record of a convicted person. In this case, although the previous convictions were admitted to be correct by the respondent, their particulars were not recorded in the notes of proceedings. Where a convicted person has a previous record, it is the duty of the Magistrate to take down the detailed particulars of the previous offences. Alternatively, a photostat copy or a certified copy of the previous record should be produced and marked as an exhibit.

[7] Notwithstanding that the reference to the record of the accused's previous convictions is permissible before the court passes sentence. In my view proper procedures have to be followed to ensure there is no miscarriage of justice. First, the accused's record of previous convictions must be furnished to court or at least presented orally by the prosecution in the hearing of the accused. I find support of this view from the same case of *PP v. Jafa Daud (supra)* where Mohamed Azmi J said:

> Where a convicted person has a previous record, it is the duty of the Magistrate to take down the detailed particulars of the previous offences. Alternatively, a photostat copy or a certified copy of the previous record should be produced and marked as exhibits.

[8] Secondly, the accused must be asked whether the lists of previous convictions were admitted to be correct. By confirming that there were previous convictions held against him, the accused must have been aware that those convictions could be used by the court to determine sentence against him. On this point, I refer to the same case, *PP v. Jafa Daud (supra)* in which case it was held that, "**where the convicted person has previous records and admits them as correct**, the court must consider whether the offence or offences committed previously were of similar nature as the one with which he is presently charged." (emphasis added)

[9] In the instant case, the above steps did not seem to appear in the Appeal Record. The requirement for the prosecution to inform the court that the accused had a previous conviction in Case No. SRA-83D-23-1-2015 was not so much needed because the court and the accused were aware of this case as it was heard immediately before the instant case (Case No. SRA-83D-47-3-2015). However, it cannot be said to be the same for Case No. SRA-83D-45-10-2014 as the convictions was made last year. It is apparent that the

court was aware of this case when he referred to it in his judgment but the accused needed to be refreshed and explained requiring his confirmation before the court could use the record of previous convictions to consider the appropriate sentence.

[10] It is in the interest of justice that the appellant should be informed or refreshed of his previous convictions and admitted the same to be correct. The appellant might not be aware of his previous convictions unless the detailed particulars are furnished to the court and the appellant. It is true that the learned Magistrate could still remember the accused's previous convictions as it was dealt with by the same court but if the accused had previous records in other courts, this could not be confirmed unless the court is shown with the detailed particulars of such previous offences.

[11] In my opinion until and unless this is ascertained, the learned Magistrate could not proceed to consider the accused's previous convictions in his sentence. As the Appeal Record did not show that the appellant was being informed, explained or refreshed of his previous convictions, I cannot but to say there was clearly procedural impropriety where justice does not appear to have been done in the instant case.

[12] For all the above reasons, I allowed the appeal and substituted the sentence of six months imprisonment to a fine of RM5,000 in default three months' imprisonment. The supervision order of three years is maintained. I hereby order so.